IN THE

Supreme Court of the United States

DEC 19 197
CAK, JR.,

October Term, 1973

No. 73 - 952

SILAS ECTOR,

Petitioner,

vs.

CITY OF TORRANCE, a Municipal Corporation; EDWARD J. FERRARO, City Manager, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of California.

STEPHEN WARREN SOLOMON,
RICHARD A. GROSSMAN,
10880 Wilshire Boulevard,
Nineteenth Floor,
Los Angeles, Calif. 90024,
(213) 474-6594; 475-6722,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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CITY OF TORRANCE, a Municipal Corporation; EDWARD J. FERRARO, City Manager, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of California.

Petitioner prays that a Writ of Certiorari issue to review the decision of the Supreme Court of California in the case of *Ector v. City of Torrance, et al.* This case was heard by the California Supreme Court and decided on October 2, 1973.

Opinions Below.

The judgment and opinion of the Los Angeles Superior Court is unpublished. A copy is filed herewith as Appendix "A". The opinion of the California Court of Appeal, Second Appellate District, is not officially reported. A copy is filed with this Petition as Appendix "B". The opinion of the Supreme Court of California is officially reported in 10 Cal.3d 129; ..... Cal.Rptr. .....; ..... P.2d ..... (1973). A copy is filed with this Petition as Appendix "C".

Jurisdiction.

The judgment of the California Supreme Court was entered on November 7, 1973. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §2101(c).

Questions Presented.

1. Whether intrastate travel is a fundamental constitutional right;

2. Whether the Torrance City Charter which requires as a condition to employment that all officers and employees thereof become residents *within* six months from the date of appointment penalizes or burdens the exercise of the fundamental constitutional right to travel and vote in violation of the Equal Protection Clause of the Fourteenth Amendment, and thus must be shown necessary to promote a compelling governmental interest.

3. Whether that portion of the Torrance City Charter, which requires as a condition to employment that all officers and employees become residents thereof *within* six months from the date of appointment, is necessary to promote a compelling governmental interest.

Ordinance.

Torrance, Cal. City Charter, Art. VII, §6:

> "All officers and employees of the City of Torrance shall be or become residents of said City within six (6) months after their appointment or date of employment provided, however, that as to appointive officers or employees having technical, special or professional knowledge or abilities, the City Council may waive the residence require-

ments. No officer or employee may be appointed permanently in the classified service unless and until he has become a resident of the City."

Statement.

On or about April 15, 1968, petitioner commenced employment with the City of Torrance as Senior Librarian. Subsequently he was permanently appointed to the position of Principal Librarian in the Classified Civil Service of that City. [C.T. p. 2, lines 2-10; p. 22, line 25.]

It is not controverted by respondents that on or about February 19, 1971, petitioner was discharged and dismissed from this position and denied all benefits incident thereto for the sole and exclusive reason that he was not, and did not intend to become, a resident of the City of Torrance as required by Article VII, Section 6 of the Torrance City Charter. This Charter provision provides as follows:

> "All officers and employees of the City of Torrance shall be or become residents of said City within six (6) months after their appointment or date of employment provided, however, that as to appointive officers or employees having technical, special or professional knowledge or abilities, the City Council may waive the residence requirements. No officer or employee may be appointed permanently in the classified service unless and until he has become a resident of the City."

Trial Court Proceedings.

Petitioner thereafter sought a Writ of Mandate from the Superior Court of Los Angeles County, State of California, which would command respondents to va-

cate the order of discharge and reinstate petitioner to his former status, with full compensation retroactive to the date of dismissal. In his Petition for Writ of Mandate petitioner alleged that the residency requirement imposed by respondents' City Charter was unconstitutional. More specifically, petitioner asserted that the residency requirement imposed by the Torrance City Charter was, among other things,[1] in violation of his federal constitutional rights as follows: (a) His right to equal protection of the law; (b) His right to freedom of travel; and (c) His right to reside in a location of his own choosing.[2]

On March 5, 1971, the Alternate Writ of Mandate issued. On May 12, 1971, a hearing was held in the Los Angeles Superior Court. On July 26, 1971, the Peremptory Writ was denied and the Alternate Writ discharged and judgment was rendered in favor of respondents.

The trial court determined as fact that the petitioner was not a resident of the City of Torrance. In addition, the trial court made the factual determination

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[1]It was also petitioner's contention below that Section 50083 of the California Government Code prohibited respondents from requiring residence as a condition of employment. Section 50083 provides in its entirety: "No local agency or district shall require that its employees be residents of such local agency or district." The California Supreme Court held that this specific statutory provision did not prohibit charter cities, such as respondent, from enacting the residency requirement at issue here. *Ector v. City of Torrance*, 10 Cal.3d 129, 132-134; .... Cal. Rptr. ....; .... P.2d .... (1973).

[2]In addition to the foregoing constitutional issues, petitioner asserted that the subject ordinance violated State and federal constitutional rights, not at issue here, including the right to public employment; inalienable rights as set forth in Art. I, §1 and Art. I, §26 of the California Constitution, and the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution.

that "petitioner was discharged from his position as librarian and all other employment with the City and removed from the civil service and denied all benefits incident thereto for the sole and exclusive reason that he was not then and did not intend to become a resident of the City." [Finding of Fact 4, C.T. 97, lines 19-24.] In construing the purpose of the challenged Charter provision, the court's finding of fact was as follows:

> "6. A purpose behind the imposition of the residence requirement was the incidental benefit to respondent City resulting from the fact that public employees, including petitioner would tend more readily to spend their earnings in respondent City if they resided there which expenditures would include the payment of local taxes, rents and shopping, to the general economic benefit of the community, which expenditures would be hardly likely for non-residents. [¶]"

Relevant portions of the trial court's conclusions of law were that the action of respondent did not violate the constitutional rights of petitioner under the Constitution of the United States in that (a) Petitioner was not denied equal protection of the law, nor the freedom to travel. *Id.* at 5. Furthermore, the trial court ruled the "requirement and restrictions of residence for City's municipal employees is reasonable and rational and furthers the public welfare of the City." *Id.* at 5. The full text of the Los Angeles Superior Court's opinion is set forth in the attached Appendix A.

Proceedings in the California Court of Appeal.

The judgment of the Los Angeles Superior Court was appealed to the California Court of Appeal, Second Appellate District. Petitioner there renewed *inter alia* his constitutional contentions and specifically

assigned error to the Superior Court's ruling that the "purpose behind the imposition of the residency requirement was the incidental benefit to Respondent City resulting from the fact that public employees, including Petitioner, would tend more readily to spend their earnings in Respondent City if they reside there . . ." [Finding of Fact 6, C.T. pp. 97-98.]

In addition, Petitioner asserted that the court below "erred in failing to apply the compelling public interest test" to the subject ordinance. Specifically, Petitioner contended:

1. The requirement of residency for municipal employees, embodied in the City Charter of the City of Torrance, Article VII, Section 6, impaired Petitioner and all municipal employees in the exercise of their "fundamental rights".

2. Pursuant to the Due Process and Equal Protection Clause of the Fourteenth Amendment, a "chilling" of "fundamental rights" can be justified only if the inhibition on the free exercise of such rights is counterbalanced by a "compelling public interest" and, if the burdens imposed are necessary to achieve such "compelling public interest".

3. The Court below erred in failing to apply the "compelling public interest" test.

4. The City of Torrance failed to produce substantial evidence that the residency requirement of the City of Torrance was necessary to promote a "compelling public interest".

5. The residency requirement is not even rationally related to the accomplishment of a legitimate governmental objective.

On appeal, the California Court of Appeal reversed the trial court in a unanimous opinion. The Court of Appeal initially observed that a stringent test with respect to compliance with the Equal Protection Clause is applicable "when a differentiation embodied in a challenged enactment adversely affects a fundamental constitutional right". App. B at 12. In reviewing the teachings of *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600, the court concluded that the right to travel was indeed a fundamental right under the Constitution. App. B at 12. In this connection the court, quoting *Krzewinski v. Kugler*, 338 F.Supp. 492 (D.C. N.J. 1972) noted:

> That the State of New Jersey, by attempting to enforce the residency requirement, would be penalizing the right to travel to a substantial degree is also clear . . . We find, therefore, that the impact of the challenged statute implicates sharply enough the right to travel to require our application of the compelling state interest test. [Citations.] *Id.* at 14.

The court further took note of that portion of *Krzewinski* which held the "public coffer" theory—employed as one of the main predicates to justify the challenged residency ordinance by the Superior Court in the instant case—as an unconstitutional justification for the residency requirement imposed under the New Jersey police and fireman residency statute. The Court of Appeal acknowledged and took note of the distinction between emergency (policeman-fireman) and non-emergency personnel:

> . . . [o]rdinarily the nature of the duties of policeman and fireman is substantially distinguish-

able from that of the duties of other city employees and affords a valid basis for a requirement of residence. In the case presently before this court, the question as to the validity of the pertinent provision of the City Charter of Torrance as applied to policeman and fireman is not presented and no determination is made with respect to that matter.

It is to be further noted that earlier cases which upheld residency requirements imposed upon city employees did not consider the matter in the light of the strict standard now prescribed by the United States Supreme Court for the review of an enactment which limits a fundamental right. (See *Purdy & Fitzpatrick v. State of California, supra,* 71 Cal.2d 566, 578-579.) Thus, no determination was made as to whether the municipality had sustained the burden of establishing not only that it had a compelling interest which justified the enactment but that the distinctions drawn by the enactment were necessary to further its purpose. *Id.* at 17-18.

Observing that petitioner was employed as a librarian, the Court of Appeal applied the foregoing constitutional standards and concluded that "no justification has been shown for an impingement upon his right of freedom to travel beyond the boundaries of the City for residential purposes. *Id.* at 18. The full text of the California Court of Appeal decision is set forth in Appendix B.

Supreme Court of California Proceedings.

On appeal, the California Supreme Court reversed the ruling of the lower appellate court and rejected petitioner's assertion that the residency requirement of respondent's City Charter was unconstitutional. The California Supreme Court refused to apply the strict equal protection test applied below, *i.e.*, that the challenged charter provision must be shown to be "necessary" to promote a "compelling" governmental interest. *Ector v. Torrance*, 10 Cal.3d 129 at 135-137 (1973). The court dismissed petitioner's assertion that the instant residency requirement impinged on his "right to travel". *Id.* at 135. It labeled petitioner's claim of the right to travel between his home and place of work as a "right to commute" not envisioned by any rulings of this Court. *Id.* at 135. As Justice Mosk stated:

> "Viewed realistically, appellant is claiming the right to 'travel' between his home and his place of employment each morning and evening of each working day—in other words, a 'right to commute'. We cannot discern such a right in the United States Supreme Court decisions relied on by appellant. Clearly the cultural and educational rewards of international travel (*Kent v. Dulles* (1958) 357 U.S. 116, 126-127 [2 L.Ed.2d 1204, 1210-1211, 78 S.Ct. 1113]) are not reaped from routine daily trips of a harassed metropolitan commuter. Nor have such trips any relevance whatever to the right to migrate among the several states for the purpose of starting a new life without fear of being denied welfare if a job is not immediately available (*Shapiro v. Thompson* (1969) 394 U.S. 618 [22 L.Ed.2d 600, 89 S.Ct. 1322]), or to the right to move within the con-

fines of a state for the same purpose without fear of being denied prompt access to public housing facilities (*King v. New Rochelle Municipal Housing Authority* (2d Cir. 1971) 442 F.2d 646; *Cole v. Housing Authority of City of Newport* (1st Cir. 1970) 435 F.2d 807). Each of the latter decisions invalidated not a residence requirement as such but a *durational* residence requirement, i.e., a requirement that the migrant not only be a resident but maintain that status for a certain minimum period of time before he qualifies for benefits. [Citations omitted.] There is no similar 'waiting period' in the provision before us, but simply a requirement of residence in the community in order to be a municipal employee. Nothing in *Shapiro* or any of its progeny stands for the proposition that an indigent may demand public assistance without being a bona fide resident of the state or locality to which he has migrated. (See also *Dunn v. Blumstein*, (1972) 405 U.S. 330, 334 [31 L.Ed.2d 274, 279, 92 S.Ct. 995] [state cannot require unreasonable period of residence as precondition to exercise of right of suffrage, but can require actual residence at time of voting]; *Thompson v. Mellon* (1973) 9 Cal.3d 96, 106 [107 Cal.Rptr. 20, 507 P.2d 628] [same rule governs right to be a candidate for public office].) Indeed, the provision here challenged does not even require immediate residence, but gives each employee six months in which to 'become' a resident of respondent city—i.e., the exact converse of a waiting period." *Id.* at 135-136.

The court, moreover, employed the more traditional equal protection test to determine whether the challenged residency requirement bore a "rational relationship to one or more legitimate state purposes". *Id.* at 134-135.

In applying this constitutional standard, the court relied upon a number of State court decisions.[3] In applying this test, the court observed:

> "Among the governmental purposes cited in these decisions or now urged by amici curiae are the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress; diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries. We cannot say that one or more of these goals is not a legitimate state purpose rationally promoted by the municipal employee residence requirement here in issue." *Id.* at 135.

The full text of the California Supreme Court's decision is set forth in Appendix "C".

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[3]See, *e.g.*, *Hattiesburg Firefighters Local 184 v. City of Hattiesburg* (Miss. 1972) 263 So.2d 767; *Williams v. Civil Service Com'n of City of Detroit* (1970) 383 Mich. 507 [176 N.W. 2d 593, 596-598]; *Mercadante v. City of Paterson* (1970) 111 N.J.Super. 35 [266 A.2d 611] affd. *per curiam* (1971) 58

(This footnote is continued on next page)

REASONS FOR GRANTING THE WRIT.

The instant case presents important and recurring questions concerning the constitutionality of municipal residency requirements and the fundamental right to travel intrastate. Moreover, the ruling of the California Supreme Court is in direct conflict with decisions of this Court. The specific issues herein presented have never been resolved by this Court and the numerous and conflicting opinions of various State and federal courts throughout the nation demonstrate the necessity for such resolution.

A. The Importance and Recurring Nature of the Issues Presented by the Instant Petition.

A large number of municipalities throughout the United States have in force residency requirements as a condition to employment. Their fundamental characteristics are similar to those of the challenged residency requirement here under consideration,[4] although they vary in imposing conditions precedent or subsequent and in the imposition of durational requirements. The

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N.J. 112 [275 A.2d 440]; *Salt Lake City Fire Fighters Local 1645 v. Salt Lake City* (1969) 22 Utah 2d 115 [449 P.2d 239, 240]; *Marabuto v. Town of Emeryville* (1960) *supra*, 183 Cal.App.2d 406; *Kennedy v. City of Newark* (1959) 29 N.J. 178 [148 A.2d 473, 475-476]. *Id.* at 134.

[4]See *e.g.*, Charter of the City of Compton, §1104 which provides: "No person may be an applicant . . . who has not resided in the City of Compton for at least one year next preceding the date of such examination." The San Francisco, California Ordinance §16.98-1 (1966) requires that ". . . [t]he residence requirement for persons entering the entrance rank of uniformed forces of the Fire Department shall be that applicants must have resided in San Francisco for the last three years." Section 25-30 of the Chicago Municipal Code provides: "All

Torrance City Charter requires that a municipal employee become a resident *within* six months from the date of employment.[5] The City of San Francisco requires members of its Fire Department to be residents at least three years prior to appointment. Chicago and Detroit require only that an employee be a resident at the time of appointment.[6] Only 36% of all counties and 17% of all cities are without some form of residency requirement.[7] If elected and appointed officials are extracted from consideration, the statistics show that 55% of the cities and 57% of the counties throughout the United States require residency as a condition of employment.[8] The fundamental constitutional question posed by all such residency requirements is whether they deny equal protection of the law under the Fourteenth Amendment and, specifically, whether they impinge or place a burden upon the fundamental rights to travel intrastate and vote, thus requiring application of the compelling state interest test to justify the enactment.

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officers and employees in classified civil service of the City shall be actual residents of the City. Any officer or employee in the classified civil service of the City who shall fail to comply with the provisions of this section shall be discharged from the service of the City in the manner provided by law."

[5]Torrance City Charter, Art. VII, §6;

[6]See Chicago Municipal Code, §25-30; Detroit, Michigan Ordinance 327-G (June 8, 1968);

[7]See B.N.A. Municipal Yearbook 160, Table 2 (1967); B.N.A. Municipal Yearbook 181, Table 12 (1970); B.N.A. Municipal Yearbook 187 (1971);

[8]*Id.* also see Comment, Residency Requirement for Municipal Employees: Denial of Right to Commute, 7 U.S.F.L.Rev. 508, 511 (1973).

B. The Ruling of the California Supreme Court That Petitioner Had No Fundamental Right to Travel Is in Conflict With the Decisions of This Court. The Supreme Court of the United States, Although Not Reaching the Specific Issue Here Presented, the Right to Intrastate Travel, Has Held That the Right to Travel and Vote Are Fundamental Rights Which Require Imposition of the Compelling State Interest Test When Such Rights Are Penalized or Burdened.

The decision of the California Supreme Court holding that petitioner has no fundamental right to travel is in conflict with the decisions of this court.

In *United States v. Guest,* 383 U.S. 745, 758, 86 S. Ct. 1170 (1966) this court noted:

> "[F]reedom to travel *throughout* the United States has long been recognized as a basic right under the Constitution." [Emphasis supplied]. See also *Passenger Cases,* 7 How. 283, 492, 12 L.Ed. 702, 789 (1849) (Taney, C.J.); *Crandall v. Nevada,* 6 Wall. 35, 43-44, 18 L.Ed. 745, 747 (1868); *Paul v. Virginia,* 8 Wall. 168, 180, 19 L.Ed. 357, 360 (1869); *Edwards v. California,* 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941); *Kent v. Dulles,* 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed. 2d 1204 (1958).

In *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) the Supreme Court considered durational residence requirements where the pertinent statute imposed a one-year waiting period for interstate migrants as a condition to receiving welfare benefits. In holding that the inhibition of migration was unconstitutional, Mr. Justice Brennan defined

the historic reaches of the fundamental right to travel, stating:

> "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty united to require that *all citizens be free to travel throughout the length and breadth of our land* uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." 394 U.S. 618, 629 (1969). [Emphasis supplied.]

Further, Justice Brennan observed that the purpose of deterring in-migration of indigents was constitutionally impermissible, for ". . . if a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *Id.* at 631, quoting *United States v. Jackson,* 390 U.S. 570, 581 (1968).

In *Shapiro,* this Court specifically rejected the "public coffer" argument. Justice Brennan noted that it was difficult to understand how long-term residents who qualified for welfare could make a greater present contribution to the state in taxes than recently arrived indigents. He observed that it was equally difficult to comprehend the logic of the argument where a large proportion of those denied welfare because of the waiting period had lengthy prior residence within the jurisdiction during which time contribution to the community through taxes may well have been made. In dismissing this rationale, Justice Brennan asserted

> "[A]ppellants' reasoning would logically permit the State to bar new residents from schools, parks and libraries or deprive them of police and fire protection. Indeed it would permit the State to

> apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services." *Id.* at 632-33.

While allowing that a state had a valid interest in conserving its fiscal resources, Justice Brennan stated emphatically that the State could not accomplish the purpose by invidious discrimination between classes of citizens. *Id.* at 394 U.S. 627-633, 89 S.Ct. 1322, 22 L.Ed.2d 600, 611-615.

The states next attempted to advance administrative objectives promoted by the waiting-period—planning of the budget, objectively testing for residency, preventing fraudulent receipt of benefits, and encouraging ". . . *early entry of new residents into the labor force*". [Emphasis added] *Id.* at 634. In discussing these state interests, Justice Brennan rejected the states' argument that a mere showing of a rational relationship between the waiting-period and these objectives would suffice to justify the classification.

> "The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." [emphasis in original]. *Id.*

Holding that the states failed to meet the burden of demonstrating a compelling interest necessary to uphold such a law, Justice Brennan concluded:

> "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause." *Id.* at 638.

This Court thus struck down the residency requirements for receipt of welfare benefits. 394 U.S. 618, 629 (1969).

In *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) the constitutionality of Tennessee's durational residency requirement for purposes of voting was challenged. The Tennessee law authorized registration to vote only to those who, at the time of the next election, had been residents of the State for one year and were residents of the county for at least three months. In *Dunn*, Mr. Justice Marshall, writing for this Court, stated:

> "Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of 'a fundamental political right . . . preservation of all rights". [Citations omitted.] There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial roll in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that a

> constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." [Citations omitted.] 405 U.S. 336, 31 L.Ed.2d 280 (1972).

Moreover, this Court held that a compelling State interest test is required to be employed where any statute "place[s] a condition on the exercise of the right to vote". 405 U.S. 337, 31 L.Ed.2d 281 (1972).

In the instant case, the residency requirement imposed by respondent's City Charter in interfering with the fundamental right to travel, also penalizes petitioner by placing an unconstitutional condition on his right to vote. If he is forced to relinquish his right to travel to and from his present home in another jurisdiction in order to receive the benefits of employment, petitioner must also relinquish his right to vote in the jurisdiction where he resides. It was this exact type of situation which caused this Court to strike down the statute in *Dunn:*

> "Only last Term, it was specifically noted that because a durational residence requirement for voting 'operates to *penalize* those persons, and only those persons, who have exercised their constitutional right of interstate migration . . . [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. *Oregon v. Mitchell,* 400 U.S. at 238, 27 L.Ed.2d at 346 (separate opinion of Brennan, White, and Marshall, JJ.). (Emphasis added.) Of course, it is true that the two individual interests affected by Tennessee's durational residence requirements are affected in different ways. *Travel-*

is permitted, but only at a price; voting is prohibited. The right to travel is merely penalized, while the right to vote is absolutely denied. But these differences are irrelevant for present purposes. *Shapiro* implicitly realized what this Court has made explicit elsewhere: 'It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied' . . ." *Harman v. Forssenius,* 380 U.S. 528, 540, 14 L.Ed. 2d 50, 58, 85 S.Ct. 1177 (1965). See also *Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616 (1967), and cases cited therein; *Spevack v. Klein,* 385 U.S. 511, 515, 17 L.Ed.2d 574, 577, 87 S.Ct. 625 (1967). [The right to travel is an *'unconditional* personal right', a right whose exercise may not be conditioned.] *Shapiro v. Thompson,* 394 U.S., at 643, 22 L.Ed.2d at 620 (Stewart, J., concurring) (Emphasis added.); *Oregon v. Mitchell, supra,* at 292, 27 L.Ed.2d at 377 (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined). Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Cf. *United States v. Jackson,* 390 U.S. 570, 52-583, 20 L.Ed.2d 138, 147, 88 S.Ct. 1209 (1968). Absent a compelling state interest, a State may not burden the right to travel in this way." *Id.* [Emphasis supplied].

The California Supreme Court attempted to distinguish the durational residency requirement in *Shapiro*, with that presented here, noting: "On almost every page of its lengthy analysis in *Shapiro* (394 U.S. at 627-642 [22 L.Ed.2d at pp. 610-619] the court characterized this pre-condition as a "waiting period requirement". *Ector, supra* at 135. This proffered distinction however is spurious. Here as in *Shapiro* a durational requirement is imposed; not in the form of a condition precedent but as a condition subsequent to employment. Notwithstanding, it places a like burden to relinquish the right to travel. It is constitutionally insignificant that this burden is placed upon an employee before or after he commences employment. The important consideration is that it places a condition on the exercise of fundamental rights at all. See *Dunn, supra* at 405 U.S. 337, 31 L.Ed.2d 281 (1972).

It is thus apparent that the strict equal protection test was required to be imposed on the subject charter provision. Applying the principles annunciated in *Shapiro*, it has not been shown that the residency requirement was "necessary" to promote a "compelling" governmental interest. The governmental purposes cited by the California Supreme Court in justification of the ordinance do not pass constitutional muster in conformance with *Shapiro*. Moreover, it should be noted that the California Supreme Court totally failed to take into consideration the specific findings of fact of the trial court which justified the existence of the ordinance solely on the basis of the 'public coffer' rationale. See App. B at 5. As this court noted in *Shapiro*, such a justification is constitutionally impermissible under a compelling state interest test. *Shapiro*, at 394 U.S. 631-634. It is abundantly clear today that municipalities

may not tie economic benefits in with contributions made to the municipal economy. *Id.* at 632-633, 89 S.Ct. 1322, 22 L. Ed.2d at 632, 633. As stated by Circuit Judge Adams in *Krzewinski v. Kugler,* 328 F. Supp. 492, 499 (U.S.D.C. N.J. 1972):

> "Any reliance upon these outdated, and apparently unconstitutional theories is disavowed by this court. Other courts have likewise read *Shapiro* to command such disavowal. *Leger v. Sailer,* 321 F.Supp. 250 (E.D. Pa 1970), aff'd *sub. nom. Graham v. Richardson, supra, Donnelly v. City of Manchester,* 274 A.2d 789 (N.H.1971)"

C. The Issue Here Presented, the Right to Intrastate Travel, or the Right to Commute, Has Not Specifically Been Ruled Upon by This Court.

In *Shapiro,* of course, this court addressed itself specifically to the right to travel interstate. In the instant case we are dealing with the right to migrate within a State or intrastate travel. The California Supreme Court ruled that such a right was not encompassed under the rulings of this court. *Ector, supra,* 10 Cal.3d 129 at 135. The California ruling, however, seems to be at variance with the underlying rationale of *Shapiro.* The court in *Shapiro* did not link the right to travel with any specific constitutional provision, commerce or otherwise. *Shapiro v. Thompson, supra,* 394 at 630, N.8, 89 S.Ct. 1322, 22 L.Ed.2d at 498; see also *Graham v. Richardson,* 403 U.S. 365, 375, 91 S.Ct. 1848, 29 L.Ed. 2d 534, 543-544 (1971). Moreover, the right to travel intrastate must of necessity be a natural and incidental outgrowth of interstate travel. To hold otherwise would effectively delimit the full constitutional dimensions of the fundamental right to interstate travel.

This later proposition has been recognized by the United States Second Circuit Court of Appeals. *King v. New Rochelle Municipal Housing Auth.*, 442 F.2d 646 (2d Cir. 1971). In *King*, Circuit Judge Waterman noted:

> "The Authority would distinguish *Shapiro* on several grounds. It is urged first that *Shapiro* does not apply to intrastate travel and therefore the residency requirement does not affect any fundamental right of respondents Green and Frazier, both of whom moved to New Rochelle from cities within New York State. However, we do not believe that the use of the term 'interstate travel' in *Shapiro* was anything more than a reflection of the statewide enactments involved in that case. Indeed, the Supreme Court specifically refused to ascribe the source of the right to travel to a particular constitutional provision, 394 U.S. at 630 and n. 8, 89 S.Ct. at 1329 but relied on 'our constitutional concepts of personal liberty', 394 U.S. at 629, 89 S.Ct. at 1329. *It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.*" [Citations omitted.] (Emphasis supplied.) Also see Note, Residence Requirements After *Shapiro v. Thompson*, 70 Colum.L.Rev. 134, 137-139 (1970).

The opposite conclusion reached by the California Supreme Court was based, at least in part, on the misplaced emphasis of this Court's dismissal of *Detroit Police Officers Assn. v. City of Detroit*, 385 Mich. 519, 190 N.W.2d 97, 405 U.S. 950, 92 S.Ct. 1173, 31 L.Ed. 2d 227 for want of a substantial federal ques-

tion. Adopting the questionable rationale in *Ahern v. Murphy*, 457 F.2d 1363 (7th Cir. 1972), Justice Mosk concluded that such dismissal amounted to a decision on the merits.[9] However, *Detroit Police* is not dispositive of the issue here presented for appellants in that case failed to articulate the fundamental right to travel as a basis for asserting the unconstitutionality of the municipal residency requirement there under consideration. See Brief for Appellant, *Detroit Police Officer's Assn. v. City of Detroit*, 405 U.S. 950 (1972). In that case appellants only asserted that ". . . the right to live where a citizen chooses is a fundamental personal liberty that cannot be abridged by a mere showing that a residency ordinance may be reasonably related to a proper city purpose." *Id.*

It is significant that the appellants failed to assert this fundamental constitutional right to travel. The absence of such an issue may well have caused this court to summarily dismiss the appeal since appellants did not bottom their claim upon *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) and its progeny.[10] In any event, since the issue presented

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[9]We note that the announced interpretation by the Seventh Circuit is subject to question. It has been persuasively held that a dismissal for want of substantial federal question is not dispositive of the issue but only persuasive precedent subject to the dictates of *stare decisis*. See *Two Guys from Harrison—Allentown, Inc. v. McGinley*, 179 F.Supp. 944 (E.D.Pa. 1959), aff'd, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961); See also, Note, "The Significance of Dismissals For Want of Substantial Federal Question", 68 Col.L.Rev. 785 (1968); but see *Stern and Gressman*, Supreme Court Practice, 197 (4th Ed. 1969). We need not entertain this issue in the instant petition, however, since, as will be shown below, the specific constitutional issue here raised was not presented in *Detroit Police* and thus such case is not dispositive of the matter here presented.

[10]This contention finds support in Comment, Residency Requirement for Municipal Employees: Denial of Right to Commute, 7 U.S.F.L.Rev. 508, 530-531 (1973).

here was not raised in *Detroit Police*, dismissal of the later case for want of substantial federal question cannot be dispositive of the instant matter. See Note, "The Significance of Dismissal for Want of Substantial Federal Question", 68 Col.L.Rev. 785 (1968).[11]

In view of the foregoing, a determination on the merits of the instant petition is ripe for constitutional adjudication.

D. The Necessity for Resolving Conflicting Decisions by This Court.

The importance and timeliness of the issues here presented have created widespread constitutional litigation throughout this Nation leading to conflicting principles and results. See *e.g., Detroit Police Officers Assn. v. City of Detroit*, 385 Mich. 519, 190 N.W. 2d 97 (1971); See, *e.g., Hattiesburg Firefighters Local 184 v. City of Hattiesburg* (Miss. 1972) 263 So.2d 767; *Williams v. Civil Service Com'n of City of Detroit* (1970) 383 Mich. 507 [176 N.W.2d 593, 596-598]; *Mercadante v. City of Paterson* (1970) 111 N.J.Super. 35 [266 A.2d 611] affd. *per curiam* (1971) 58 N.J. 112 [275 A.2d 440]; *Salt Lake City Fire Fighters Local 1645 v. Salt Lake City* (1969) 22 Utah 2d 115 [449 P.2d 239, 240]; *Marabuto v. Town of Emeryville* (1960) *supra*, 183 Cal.App.2d 406; *Kennedy v. City of Newark* (1959) 29 N.J. 178 [148 A.2d 473, 475-476]; *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2d Cir. 1971); *Cole v. Housing Authority of City of Newport*, 435 F.2d 807 (1st.

[11]It should also be noted that *Detroit Police* can be distinguished on the ground that it involved a challenge by municipal employees who fell within the classification of emergency personnel. The instant petitioner, a librarian, does not fall within this category.

Cir. 1970); *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972); *Krzewinski v. Kugler*, 338 F.Supp. (D.C.N.J. 1972); *Donnelly v. City of Manchester*, 274 A.2d 789 (N.H. 1971). The conflict, dimensions and far reaching importance of such issues require resolution by the Supreme Court of the United States.

Conclusion.

For the foregoing reasons the instant Petition for Writ of Certiorari should be granted.

December 18, 1973.

Respectfully submitted,

STEPHEN WARREN SOLOMON,
RICHARD A. GROSSMAN,
Attorneys for Petitioner.

APPENDIX A.

Memorandum Opinion.

Superior Court of the State of California, for the County of Los Angeles.

Silas Ector, Petitioner, vs. City of Torrance, et al., Respondents. No. 997 818.

Filed: July 26, 1971.

In this mandate proceeding petitioner seeks the aid of the Court in restoring him to a position as Librarian of the City of Torrance from which post he was discharged after a few years' service because he failed and refused to become a resident of that city in accordance with a charter provision which required all officers and employees of the city to become residents thereof within six months after their employment commenced. His attack is directed to this requirement as an unconstitutional requirement denying him as a nonresident equal protection of the laws and his right to public employment without onerous conditions.

Although the Government Code § 50083 purports to eliminate residence requirements for employment by local entities, this section is not deemed applicable to charter cities whose charters provide for residence, as does the defendant's, City of Torrance. (Art. IX, Sec. 6, Const; *City of Pasadena v. Charleville,* 215 Cal. 384.) Petitioner's claim, then, must stand or fall on his contentions that the charter requirement is constitutionally defective in denying him, a nonresident, equal protection of the laws with residents of the defendant city and his constitutional right to seek public employment (*Purdy,* 71 Cal. 2d 566) and to be continued therein without onerous conditions (*Bagley v.*

Washington, 65 Cal.2d 449). He relies upon certain cases dealt with hereinafter which he contends have dissipated the power of governments to impose residence requirements. No case relied on presents a factual context on all four but the principles derived therefrom are urged to be applicable and decisive herein. Because we find substantial distinctions do, in fact, exist, his position cannot be accepted.

While it cannot be gainsaid that he, like everyone else, has a "right to public employment", this right may be properly qualified by reasonable and appropriate conditions evidencing a "compelling state interest". *Bagley* did hold that the State may impose conditions upon public employment even though a constitutional right may be thus impaired under certain circumstances. Such conditions will not be set aside if (1) the Government bears the burden of demonstrating the practical necessity for the limitation, showing that the conditions relate to the purposes of the legislation which confers the neighbor privilege, (2) the condition must reasonably tend to further the purpose sought by conferment of the benefit, (3) the utility of imposing the condition must outweigh any resulting impairment of any constitutional right, (4) the Government must establish the unavailability of less offensive alternatives, (5) the conditions must be drawn with sufficient specificity. An application of standards 3, 4, 5 in their present consideration with respect to the City of Torrance, or any other city for that matter, presents no problem. (3) Because of the freedom to seek employment, public or private, in any place including the place where petitioner does in fact reside, it must be deemed a de minimis impairment of a constitutional right, if at all, to require residence within the geographical boundaries of the employing

entity as compared to the 100% utility (in imposing the condition of residence)—in accomplishing the purposes of the legislation (to be discussed hereinafter). Petitioner is by no means actually deprived or denied his constitutional right of employment—it was and is his privilege to *accept* employment and then change his place of residence, to accomplish the salutary purpose of the legislation. If employment in the first instance were limited to residents only, the condition would be more suspect and possibly tainted with a constitutional vice of denial of equal protection. (4) As to the unavailability of less offensive alternatives, this condition of residence is manifestly the *only* way the purposes of the legislation can be achieved and the simple requirement of becoming a city resident within a given period after employment satisfies requirement (5).

The (1) and (2) *Bagley* requirements next receive our attention. Counsel for the city admits that the exact reasons which created the condition of residence cannot be accurately pinpointed two decades later but suggests, among other reasons, the following:

(a) to make emergency personnel quickly available when needed;

(b) to create greater concern for, and therefore attention to, the priority of service.

(c) As an incidental benefit, public employees would tend more readily to spend their earnings where they resided—including the payment of local *taxes,* rents, and shopping to the general economic benefit of the community. This would be hardly likely for nonresidents, such as petitioner who resides in Santa Monica and obviously would rush in and out as a commuter with a minimum likelihood of doing any shopping in Tor-

rance or otherwise contributing to the economic growth of the community in the other areas mentioned. As to (a) above, this is not applicable to a librarian such as plaintiff; as to (b), this is too esoteric upon which to make a definitive finding or conclusion herein, since it is highly debatable that a nonresident employee would have less concern (or greater) for the quality of service —that is a purely individual concern in every case.

Inextricably involved in (c) is a sociological thesis urged upon the Court by counsel for the city. Just as the Superior Court in *Brown v. Board of Education*, canvassed sociological trends and took note thereof in overruling *Plessy v. Ferguson's* separate but equal doctrine, it is contended, this Court should take note of the sociological trend of the "flight of the whites" from the cities, including one adjacent to defendant city, as ruinous of the tax base and the economy of the city and, in furtherance of the national policy of integration, we should recognize the necessity and the validity of the residence requirement. The creation of urban shells must be resisted. While ingenuous as an approach to the problem, in the present context it cannot be said with any accuracy whatever that such motivation existed in 1950 when this charter provision was adopted at a time when the present "integration policy" was only aborning. It is not necessary to reach out when (c) above, in itself, is so patently applicable and purposeful with respect to the condition of residence. In this connection the (1) condition of *Bagley* is amply "demonstrated", for purposes of mandate proceedings which are extraordinary in nature, with great discretion in the chancellor.

There appears to be no California case dealing with the simple question here. The absence thereof might

well tend to suggest that it has not been and is not a constitutional problem for it has been repeatedly held that there is a strong presumption of the constitutionality of an act of the "Legislature". *Delaney*, 25 Cal. 2d 561. Hence no challenge has heretofore been reported. Elsewhere, we find in New Jersey (*Kennedy*, 148 A. 2d 743 (1959)) the Court has held the requirement of residence for municipal employees reasonable and rational and that it furthered the public welfare. Minnesota (*Rey v. Minneapolis*, 143 N.W.2d 200) relied on *Kennedy* in holding the requirement not unconstitutional. Utah went along in a firefighter's case (449 P.2d 239) in which the United States Supreme Court denied certiorari (395 U.S. 706).

Petitioner's reliance on *Shapiro*, 394 U.S. 618 (1969), is misplaced. All the Court did in that welfare-residence case was to strike down the one-year durational requirement. It did not hold residence per se would be an unconstitutional requirement and specifically stated it was "implying no view" of requirements in areas which might compel a state interest. For the same reason, petitioner cannot rely on *Zeilenga*, 12 Cal. App.3d 775, and *Lawrence v. Cleveland*, 13 Cal.App. 2d 127, where the courts merely held five-year residence requirements for office candidacy had no compelling state interest justifying such long residence requirements—it was not held that residence per se or even a limited period requirement for eligibility would be stricken down. In support of this latter position, see *Lindsey*, 217 Cal. 533, where the Supreme Court upheld an L.A. Charter provision prescribing two years' residency for eligibility for councilmanic candidates.

It is also urged upon this Court that petitioner's residence was known at all times by the superior city officials who at one time or another indicated to petitioner they would not enforce the residence requirement and in fact waited two years or more before taking action to enforce it. If this is meant to urge some kind of estoppel or waiver against the city, the plain answer is that petitioner can't place himself in an estoppel position because he has not shown any change of position in reliance on the foregoing representations and delay nor can it be successfully argued that any city employee is authorized to waive, by representation or delay, the charter provision. Nor does his argument hold water that 58003 Government Code binds the city because as a general law it is binding on a chartered city if it relates to a matter of statewide concern. The long and short of that contention is that no one outside the city has any concern at all as to who is employed by the defendant. The cases cited by him, *Professional Firefighters v. City of L.A.*, 60 Cal.2d 276, and others, are not applicable herein, dealing in fact with areas of statewide concern and upholding the pre-emption doctrine in those areas where charters conflicted with state general laws. The need for uniformity in residence requirements throughout the state is not shown for the obvious reason that it does not exist.

The need for mobility of the working force from community to community as the need exists is a good economic or sociological argument better addressed to the legislature or the chartered city—comparable to the integration argument of respondent—as an exercise of legislative policy and wisdom rather than to the courts.

While we recognize that there is a trend to eliminate the residence requirement in many entities—and even in the defendant city—nevertheless, this case cannot be decided on the *trend* but must rest upon the constitutionality of the present requirement.

Because we cannot find that this enactment is clearly arbitrary and unreasonable and without relation to the city's public welfare, we cannot and must not declare it to be unconstitutional. (*Euclid v. Ambler*, 272 U.S. 365.)

The application must therefore be denied and the alternative writ discharged. Counsel for respondent will submit findings, conclusions and judgment after serving same.

DATED: July 24, 1971.

/s/ Max Z. Wisot
MAX Z. WISOT
Judge of the Superior Court

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Silas Ector, Petitioner and Appellant, vs. City of Torrance, etc., et al., Respondents. 2 Civil No. 39769, (Superior Ct. No. 997818).

Filed: Oct. 26, 1972.

APPEAL from a judgment of the Superior Court of Los Angeles County in a proceeding in mandamus. Max Z. Wisot, Judge. Judgment reversed with directions.

Kurlander, Solomon & Hart, Stephen Warren Solomon and Ronald L. Gould for Appellant.

Ralph H. Nutter for Respondents.

THE COURT:

Appellant, Silas Ector, appeals from a judgment denying his petition for a peremptory writ of mandate wherein he sought vacation of respondent City of Torrance's order terminating his employment as a librarian with respondent city and removing him from classified civil service, and reinstatement to his former position with full back compensation.

The undisputed facts set forth in appellant's petition reveal that on or about April 15, 1968, appellant commenced employment as a senior librarian with respondent city. On or about September 30, 1968, appellant was appointed to the position of principal librarian. On March 31, 1969, appellant was appointed permanently in the classified civil service to the position of principal librarian. Appellant served in that capac-

ity continuously thereafter to and including February 19, 1971.

On or about February 19, 1971, appellant was discharged by respondent city from his position as principal librarian and from any and all other employment with respondent city, and he was removed from the classified civil service and denied all benefits incidental thereto, for the sole reason that he was not and did not intend to become a resident of the City of Torrance.

Article VII, section 6, of the Torrance City Charter provides: "All officers and employees of the City of Torrance shall be or become residents of said City within six (6) months after their appointment or date of employment provided, however, that as to appointive officers or employees having technical, special or professional knowledge or abilities, the City Council may waive the residence requirements. No officer or employee may be appointed permanently in the classified service unless and until he has become a resident of the City."

In his petition for writ of mandate appellant alleged that respondents' action in terminating his employment and removing him from classified civil service was in excess of respondent city's jursidction because of the proscription of Government Code section 50083[1] and was in violation of appellant's constitutional rights, specified as follows: "(a) His right to equal protection of the law; (b) His right to freedom of travel; (c)

[1]Section 50083 of the Government Code provides: "No local agency or district shall require that its employees be residents of such local agency or district." Section 50001 of that code is as follows: " 'Local agency' as used in this division means county, city, or city and county, unless the context otherwise requires."

His right to reside in a location of his own choosing; (d) His right to public employment; (e) His inalienable rights as set forth in Article I, Section 1 of the California Constitution; and (f) His privileges and immunities granted to all other citizens, as set forth in the Fourteenth Amendment to the United States Constitution and Article I, Section 21 of the California Constitution."

Portions of the findings of fact of the trial court were as follows: "1. Respondent City of Torrance . . . was and now is a municipal corporation and charter city operating under the laws of the State of California. . . . [¶] 5. At all times herein mentioned petitioner was not a resident of the City of Torrance. [¶] 6. A purpose behind the imposition of the residence requirement was the incidental benefit to respondent City resulting from the fact that public employees, including petitioner would tend more readily to spend their earnings in respondent City if they resided there which expenditures would include the payment of local taxes, rents and shopping, to the general economic benefit of the community, which expenditures would be hardly likely for non-residents. [¶] 7. The incidental benefit referred to hereinabove in paragraph 6 is sufficient to justify the imposition of the residency requirement by respondent City as it serves as a reasonable basis to justify such action."

The conclusions of law of the trial court were as follows: "1. The action of respondent in terminating petitioner's employment and removing him from classification of civil service was not in violation of Section 50083 of the Government Code, which is not applicable to respondent chartered city. [¶] 2. Article VII, Section 6 of the Torrance City Charter is con-

stitutional in accordance with the United States and California Constitutions. [¶] 3. The action of respondent as aforesaid did not violate the constitutional rights of petitioner under the California Constitution and the Constitution of the United States in that: (a) Petitioner was not denied equal protection of the law. (b) Petitioner was not denied freedom to travel. (c) The requirement and restriction of residence for City's municipal employees is reasonable and rational and furthers the public welfare of the City. [¶] 4. Article VII, Section 6 of respondent's charter is not arbitrary, unreasonable and without relation to respondent city's public welfare. [¶] 5. The action of City in terminating Petitioner because of his failure to comply with Article VII, Section 6 did not deny Petitioner privileges and immunities as set forth in the United States and California constitutions. [¶] 6. The conduct of respondents in terminating petitioner was not arbitrary. [¶] 7. The petitioner is not entitled to back compensation. [¶] 8. The action of the respondents in terminating petitioner was not in excess of the jurisdiction and was in accordance with the manner required by law. [¶] 9. Judgment should be entered: (a) Ordering the denial of the Writ of Mandate and the discharge of the alternative writ. (b) Awarding Respondents its costs in this action."

Turning first to the constitutional issue, as will be explained the claim asserted by the appellant rests basically on alleged denials of his right to equal protection and his right to freedom of travel as guaranteed by the Constitution of the United States. The equal protection argument challenges the classification which differentiates between resident and nonresident persons insofar as the continuation of city employment is concerned, while the contention as to the right to freedom of

travel attacks the power of the city to prohibit its employees from residing at a location which is not within the boundaries of the city.

A stringent test with respect to compliance with the Equal Protection Clause of the Fourteenth Amendment is applicable when the differentiation embodied in a challenged enactment adversely affects a fundamental constitutional right. Thus, in the case of *In re Antazo,* 3 Cal.3d 100, at page 110, the Supreme Court stated: "The traditional test has been that the 'distinction drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal.' (*McDonald v. Board of Election Comrs.* (1969) 394 U.S. 802, 809 [22 L.Ed.2d 739, 745-746, 89 S.Ct. 1404].) But a stricter standard has been prescribed in cases involving 'suspect classifications' or 'fundamental interests.' (*Purdy & Fitzpatrick v. State of California, supra,* 71 Cal.2d at pp. 578-579.)"

In *Purdy & Fitzpatrick v. State of California,* 71 Cal.2d 566, at pages 578-579, it was stated: "Under the Fourteenth Amendment, the state may not condition public employment upon a waiver of constitutional right [fn. omitted] nor may the state create arbitrary classifications for purposes of hiring and firing public employees. [Fn. omitted.] [¶] The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. In cases involving 'suspect classifications' [fn. omitted] or 'fundamental interest' [fn. omitted] of those suffering discrimination, the United States Su-

preme Court prescribes a strict standard for reviewing the particular enactment under the equal protection clause. Not only must the classification reasonably relate to the purposes of the law [fn. omitted], but also the state must bear the burden of establishing that the classification constitutes a necessary means of accomplishing a legitimate state interest [fn. omitted], and that the law serves to promote a compelling state interest."

The initial inquiry, therefore, is whether the respondent city must demonstrate a reasonable basis for the classification as to residence or, under the strict standard, a compelling interest in it. With respect to freedom to travel as a basic right under the Constitution, in *Shapiro v. Thompson,* 394 U.S. 618, at page 634, 89 S.Ct. 1322, 22 L.Ed.2d 600, at page 615, the United States Supreme Court stated: "But in moving from State to State or to the District of Columbia appellees [plaintiffs] were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." The question of whether a requirement that a municipal employee reside in the municipality penalizes the right of freedom to travel to a substantial degree has been discussed in recent cases.

In *Krzewinski v. Kugler* (D.C.D.N.J. 1972) 338 F.Supp. 492, a three-judge panel was convened pursuant to 28 U.S.C. § 2281 to determine the constitutionality of the New Jersey police and firemen tenure statute which provided in substance that municipal police and firemen were required to maintain residence in the municipality wherein they were respectively employed. In the opinion of the court written by Circuit

Judge Adams it was stated (338 F.Supp. at p. 498): "That the State of New Jersey, by attempting to enforce the residency requirement, would be penalizing the right to travel to a substantial degree is also clear. . . . We find, therefore, that the impact of the challenged statute implicates sharply enough the right to travel to require our application of the compelling state interest test. (See Shapiro v. Thompson, *supra,* 394 U.S. at 629, 634, 638, 89 S.Ct. 1322; Cole v. Housing Auth., *supra,* 435 F.2d at 809-811.)"

While in *Krzewinski* the court found that the residency requirement was valid with respect to policemen and firemen because of the distinctive nature of their respective duties and of their particular relationship to the inhabitants of the municipality, portions of the opinion offer guidance in the resolution of the question presently before this court. Thus, in *Krzewinski* Circuit Judge Adams stated (338 F.Supp. at p. 498): "Certain interests, not seriously asserted here, such as the 'public coffer' theory and the right-privilege dichotomy have been offered in the past to justify a residency requirement for public servants which over the years have lost not only their compelling nature but also their constitutionality.[4]" In footnote 4 the statement just quoted was expanded as follows (338 F.Supp. at pp. 498-499): "The 'public coffer' theory states that the salaries paid to civil servants ought to recirculate within the economy of the municipality that pays those salaries. In this way, municipal funds are preserved for a municipality's own residents. But this theory, as best expressed in People v. Crane, 214 N.Y. 154, 108 N.E. 472, aff'd sub nom. Crane v. New York, 239 U.S. 195, 36 S.Ct. 85, 60 L.Ed. 218 (1915), was sharply rejected by the Supreme Court in Shapiro v. Thompson,

supra. Municipalities may not tie economic benefits in with contributions made to the municipal economy. *Id.* at 632-633, 89 S.Ct. 1322. The public coffer doctrine is merely a natural outgrowth of the once held belief that public employment is not a right, but a privilege, which the state confers in all its beneficence. . . . Any reliance upon these outdated, and apparently unconstitutional theories is disavowed by this Court. Other courts have likewise read *Shapiro* to command such disavowal. Leger v. Sailer, 321 F.Supp. 250 (E.D. Pa. 1970) aff'd sub nom. Graham v. Richardson, *supra* [1971) 403 U.S. 365, 91 S.Ct. 1848, 20 L.Ed.2d 534]; Donnelly v. City of Manchester, 274 A.2d 789 (N.H. 1971)."

In *Donnelly v. City of Manchester* (N.H. 1971) 274 A.2d 789, the plaintiff, employed as a school teacher by the defendant city, sought a declaratory judgment as to the validity of an ordinance of the city which required that all classified employees of the city, including school teachers, be or become residents of the city within twelve months of their employment unless granted a special permit for certain specified reasons. The Supreme Court of New Hampshire held that the ordinance embodied an unconstitutional exercise of governmental power and was to that extent invalid.

In the course of its reasoning the New Hampshire court stated (274 A.2d at pp. 791-792): "The right of every citizen to live where he chooses and to travel freely not only within the state but across its borders is a fundamental right which is guaranteed both by our own and the Federal Constitutions. Ratti v. Hinsdale Raceway, 109 N.H. 270, 249 A.2d 859 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322,

22 L.Ed.2d 600 (1969). It is fundamental also that both Constitutions guarantee to all persons the equal protection of the laws, (State v. Pennoyer, 65 N.H. 113, 18 A. 878 (1889)) so that 'all persons should be equally entitled to pursue their happiness * * *.' *Id.* at 115, 18 A. at 880. [¶] There is no question but that the Manchester ordinance places a restriction on a fundamental right of its employees to live where they wish. This being so the ordinance can be upheld only if the requirement that the employees live within the city serves a public interest which is important enough to justify the restriction on the private right. There is nothing in the record before us nor have any reasons been advanced which would justify the broad restrictions of this ordinance. We do not say that there are no employees whose residence near their place of duty may not be important enough to justify a restriction upon their place of residence but if such restrictions are permissible as to some this does not justify the broad and all inclusive requirement that all employees live within the city limits. Nothing has been brought to our attention in the record in this case which would justify the application of the restriction to schoolteachers. . . . [¶] It is true, as contended by the defendant, that there is no constitutional right to work for the city, but this does not mean that the granting of this privilege may be conditioned upon a surrender of a fundamental constitutional right. The old right-privilege distinction is no longer valid, (Shapiro v. Thompson, *supra* note 6; Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)), and discrimination against some in public employment can no longer be practiced on the basis that the employment is a privilege which can be withheld from all. Ratti

v. Hinsdale Raceway *supra* (dissenting opinion); Purdy & Fitzpatrick v. State, 71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969). [¶] It has been argued that those who are employed by the city should help support the cost of their employment by contributing to the economy of the city and to its tax base. But employees of the city earn their salaries, and any governmental interest in compelling them to be residents for whatever financial benefit there may be to the city from such residence is slight compared to the important interference with their private rights."

It is true that some courts have held residency requirements for public employees to be valid. Thus, in *Marabuto v. Town of Emeryville,* 183 Cal.App.2d 406, such a requirement was upheld as to policemen and firemen, the court stating at page 410: "Appellants argue that residence can not be a qualification because it has 'no reasonable relation to the ability of an employee to perform the duties . . .' Emeryville has small forces of firemen and police to cope with the hazards due to its concentrated industrial activities. The fire and police chiefs testified that, in emergencies, firemen and policemen could not be relied on for quick response when living at great distances from the city, and it is a matter of common knowledge that in such emergencies even a short delay may be fatal. Residence has generally been treated as a qualification." As held in *Krzewinski v. Kugler, supra,* 338 F.Supp. 492, ordinarily the nature of the duties of policemen and firemen is substantially distinguishable from that of the duties of other city employees and affords a valid basis for a requirement of residence. In the case presently before this court, the question as to the validity of the pertinent provision of the city charter of Torrance as

applied to policemen and firemen is not presented and no determination is made with respect to that matter.

It is to be further noted that earlier cases which upheld residency requirements imposed upon city employees did not consider the matter in the light of the strict standard now prescribed by the United States Supreme Court for the review of an enactment which limits a fundamental right. (See *Purdy & Fitzpatrick v. State of California, supra,* 71 Cal.2d 566, 578-579.) Thus, no determination was made as to whether the municipality had sustained the burden of establishing not only that it had a compelling interest which justified the enactment but that the distinctions drawn by the enactment were necessary to further its purpose.

In the case presently before this court the appellant was employed by the city in the capacity of a librarian. Under the governing standard no justification has been shown for an impingement upon his right of freedom to travel beyond the boundaries of the city for residential purposes.

In view of the determination made as to the constitutional question involved, it is unnecessary to discuss the matter of the legal impact of section 50083 of the Government Code upon the pertinent provision of the charter of the City of Torrance.

The judgment is reversed and the cause is remanded to the superior court for further proceedings not inconsistent with the opinion herein.

CERTIFIED FOR PUBLICATION

APPENDIX C.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, In Bank.

Silas Ector, Plaintiff and Appellant, v. City of Torrance, et al., Defendants and Respondents. L.A. 30100, (Super. Ct. No. 997818).

Filed: Oct. 2, 1973.

This is an appeal by a former city employee from a judgment denying his petition for writ of mandate to compel respondent City of Torrance to vacate its order terminating his employment and to reinstate him with full back pay. Appellant contends that the requirement of respondent's charter that its officers and employees reside within its borders contravenes a state statute forbidding such a job qualification (Gov. Code, § 50083) and denies him certain constitutional rights. We conclude that neither of appellant's points is well taken and hence that the judgment must be affirmed.

Respondent City of Torrance is a charter city. Article VII, section 6, of its charter declares that "All officers and employees of the City of Torrance shall be or become residents of said City within six (6) months after their appointment or date of employment provided, however, that as to appointive officers or employees having technical, special or professional knowledge or abilities, the City Council may waive the residence requirements. No officer or employee may be appointed permanently in the classified service unless and until he has become a resident of the City."

In 1968 appellant was employed by respondent as a librarian, and in the following year received an appointment in the city's classified civil service. He never became a resident of Torrance, however, and in 1971 he was discharged for violation of the residence requirement of article VII, section 6.[1] He brought this action in administrative mandamus, challenging the validity of the residence requirement. The trial court upheld the provision and denied relief.

Appellant contends that Government Code section 50083 prohibits respondent from requiring residence as a condition of employment. Section 50083 provides in its entirety that "No local agency or district shall require that its employees be residents of such local agency or district." Appellant relies on section 50001 of the same code, which declares generally that " 'Local agency' as used in this division [*i.e.*, including § 50083] means county, city, or city and county, unless the context otherwise requires." It is urged that respondent is a "city" within the definition of section 50001 and hence is bound by the prohibition of section 50083. As will appear, however, when the legislation is read together with certain governing provisions of the Constitution "the context otherwise requires" a more limited meaning for the term "local agency" in section 50083: *i.e.*, when the agency in question is a city, the section is intended to apply only if it is a general law city rather than a charter city. Respondent, as noted above, is the latter.

To begin with, this not the usual case in which the courts are without constitutional guidance in resolving

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[1]Appellant thereafter found similar employment with the City of Azusa.

the question whether a subject of local regulation is a "municipal affair" and hence within the general home rule power vested in charter cities by subdivision (a) of section 5, article XI, of the Constitution.[2] (See, *e.g.*, Bishop v. City of San Jose (1969) 1 Cal.3d 56, 62, and cases cited.) Here we have the benefit of a specific directive in subdivision (b) of that section, which grants "plenary authority" to charter cities to prescribe in their charters the "qualifications" of their employees.[3] A requirement that a municipal employee reside within the borders of the city that hires and pays him has long been deemed a "qualification" for the employment in question, similar in this regard to minimum standards of age, health, education, experience, or performance in civil service examinations. (Marabuto v. Town of Em-

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[2]The cited provision reads: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."

[3]The cited provision reads: "It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) *plenary authority is hereby granted,* subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, *qualifications,* tenure of office and removal of such deputies, clerks and other employees." (Italics added.)

Until the 1970 revision of this portion of the Constitution, similar language appeared in former article XI, section 8½.

eryville (1960) 183 Cal.App.2d 406, 410-411; Galli v. Brown (1952) 110 Cal.App.2d 764, 775; Dierssen v. Civil Service Commission (1941) 43 Cal.App.2d 53, 57; cf. Ball v. Public Welfare Department (1957) 151 Cal.App.2d 784, 788; Denton v. City & County of San Francisco (1953) 119 Cal.App.2d 369, 375.)[4]

It follows that a statute purporting to prohibit charter cities from prescribing municipal employee residence requirements in their charters would contravene that explicit constitutional authorization. We must presume that in adopting section 50083 the Legislature intended to enact a valid statute (In re Kay (1970) 1 Cal.3d 930, 942), and therefore meant to limit its reach to general law cities.

In the present context, moreover, the presumption is confirmed by legislative history. Section 50083 was enacted in the 1970 session. In the immediately following session Assembly Bill 1935 was introduced, proposing to expand section 50083 by declaring that " 'Local agency' for the purpose of this section includes charter cities and charter counties." Obviously aware of the constitutional prohibition against his proposal, the author of this bill simultaneously introduced Assembly Constitutional Amendment 53, which would have added the following exception to subdivision (b) of section 5, article XI (*ante*, fn. 3): "No provision of this article shall limit the power of the Legislature to prohibit charter cities from imposing a residence requirement upon their employees as a qualification for employment."[5]

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[4]The rule was applied more than half a century ago in Hellyer v. Prendergast (N.Y. 1917) 162 N.Y.S. 788, 790.

[5]The amendment would also have added an identical exception to the provision governing charter counties (art. XI, § 4, subd. (f)).

After passing the Assembly in an amended form, Assembly Bill 1935 was further amended in the Senate to exclude from its reach "a charter city and county"—*i.e.*, San Francisco—and "charter cities of over 2,000,000 population"—*i.e.*, Los Angeles. The measure was debated on the floor and narrowly defeated on its third reading by a roll call vote of 13 to 12. (5 Sen. J. (1971 Sess.) pp. 9242, 9247.) We may reasonably infer that by so voting the Legislature rejected the very extension of the statute which appellant now asks us to adopt under the guise of judicial construction. This, of course, we may not do.

Appellant also contends that the residence requirement of respondent's charter is unconstitutional.[6] In Detroit Police Officers Assn. v. City of Detroit (Mich. 1971) 190 N.W.2d 97, a similar municipal employee residence requirement was sustained against a charge that it violated the equal protection clause of the Fourteenth Amendment. An appeal was taken to the United States Supreme Court, but that court ordered the matter "dismissed for want of substantial federal question." (405 U.S. 950.) Shortly thereafter a federal circuit court of appeals held that the dismissal amounted to a decision on the merits by the United States Supreme Court that such a municipal employee residence requirement does not violate any provision of the federal Constitution. (Ahern v. Murphy (7th Cir. 1972) 457 F. 2d 363.) The rule of construction invoked by the *Ahern* court has been recognized in California decisions. (Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal.2d 1215, 1221, fn. 4; People v. Supe-

[6]See generally Comment, *Residency Requirements for Municipal Employees: Denial of a Right to Commute?* (1973) 7 U.S.F. Law Rev. 508.

rior Court (1972) 28 Cal.App.3d 600, 619-620.) Applied here, it leads us to reject this attack on the validity of respondent's residence requirement.

We need not, however, rest our conclusion exclusively on the foregoing reasoning. In addition to the *Detroit Police Officers Assn.* case, a number of other decisions have held that a municipal employee residence requirement bears a rational relationship to one or more legitimate state purposes, and hence is constitutional under the traditional equal protection test. (See, *e.g.*, Hattiesburg Firefighters Local 184 v. City of Hattiesburg (Miss. 1972) 263 So.2d 767; Williams v. Civil Service Com'n of City of Detroit (Mich. 1970) 176 N.W.2d 593, 596-598; Mercadante v. City of Paterson (N.J. Super. 1970) 266 A.2d 611, affd. per curiam (1971) 275 A.2d 440; Salt Lake City Fire Fighters Local 1645 v. Salt Lake City (Utah 1969) 449 P.2d 239, 240; Marabuto v. Town of Emeryville (1960) supra, 183 Cal.App.2d 406; Kennedy v. City of Newark (N.J. 1959) 148 A.2d 473, 475-476.)

Among the governmental purposes cited in these decisions or now urged by amici curiae are the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress; diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries. We cannot say that one or more

of these goals is not a legitimate state purpose rationally promoted by the municipal employee residence requirement here in issue.

Appellant contends in the alternative that respondent's residence requirement must be judged by the "strict" equal protection test, *i.e.*, must be shown to be "necessary" to promote a "compelling" governmental interest. To justify invoking the strict standard of scrutiny, appellant proposes a number of "fundamental rights" which he asserts are curtailed by the provision in question.

First it is said that the residence requirement impinges on appellant's "right to travel." The contention is not persuasive. Viewed realistically, appellant is claiming the right to "travel" between his home and his place of employment each morning and evening of each working day—in other words, a "right to commute." We cannot discern such a right in the United States Supreme Court decisions relied on by appellant. Clearly the cultural and educational rewards of international travel (Kent v. Dulles (1958) 357 U.S. 116, 126-127) are not reaped from routine daily trips of a harassed metropolitan commuter. Nor have such trips any relevance whatever to the right to migrate among the several states for the purpose of starting a new life without fear of being denied welfare if a job is not immediately available. (Shapiro v. Thompson (1969) 394 U.S. 618), or to the right to move within the confines of a state for the same purpose without fear of being denied prompt access to public housing facilities (King v. New Rochelle Municipal Housing Authority (2d Cir. 1971) 442 F.2d 646; Cole v. Housing Authority of City of Newport (1st Cir. 1970) 435 F.2d 807). Each of the latter decisions invalidated not a

residence requirement as such but a *durational* residence requirement, *i.e.*, a requirement that the migrant not only be a resident but maintain that status for a certain minimum period of time before he qualifies for benefits.[7] There is no similar "waiting period" in the provision before us, but simply a requirement of residence in the community in order to be a municipal employee. Nothing in *Shapiro* or any of its progeny stands for the proposition that an indigent may demand public assistance without being a bona fide resident of the state or locality to which he has migrated. (See also Dunn v. Blumstein (1972) 405 U.S. 330, 334 [state cannot require unreasonable period of residence as precondition to exercise of right of suffrage, but can require actual residence at time of voting]; Thompson v. Mellon (1973) 9 Cal.3d 96, 106 [same rule governs right to be a candidate for public office].) Indeed, the provision here challenged does not even require immediate residence, but gives each employee six months in which to "become" a resident of respondent city—*i.e.*, the exact converse of a waiting period.[8]

Appellant suggests other fundamental rights said to be affected by respondent's residence requirement. He asserts that it violates his right to "marry, establish a home, and bring up children" because it "limits the

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[7]On almost every page of its lengthy analysis in *Shapiro* (394 U.S. at pp. 627-642) the high court characterizes this precondition as a "waiting-period requirement."

[8]These distinctions were apparently not perceived in the two cases contrary to our conclusion on this point. (Krzewinski v. Kugler (D.N.J. 1972) 338 F.Supp. 492, 497-498; Donnelly v. City of Manchester (N.H. 1971) 274 A.2d 789.)

options" as to the setting—urban or suburban, multiple or single-family dwelling—in which he may choose to accomplish these objectives. He also argues that it impairs his freedom of association because it forces him to live among neighbors "who may be less congenial or less interesting than those in other localities." And he urges that it invades his right of privacy because the choice of where to locate a residence "is a decision about which one has a 'reasonable expectation' of privacy."

Not surprisingly, appellant is able to cite no authority supporting these somewhat esoteric claims. It is self-evident from appellant's proffered justifications that he is stretching his case mightily to bring it within the scope of the named fundamental rights. The critical question whether a legislative act is to be denied the presumption of validity and subjected to strict judicial scrutiny does not turn on the ingenuity of counsel in conceiving remotely possible ways in which the act might affect those rights. Appellant need not necessarily prove he was wholly denied the rights he now invokes, but he must at least show that his exercise of those rights was actually and significantly impaired.

Instead, appellant asks us in effect to declare a fundamental right to be "let alone" in the choice of his place of residence. We are not unsympathetic to that Thoreauvian goal, although we fear that in this day of land-use planning, zoning, and environmental controls, it may be increasingly difficult to achieve. Nevertheless, as Chief Justice Weintraub of New Jersey ex-

plained, in this type of case "The question is not whether a man is free to live where he will. Rather the question is whether he may live where he wishes and at the same time insist upon employment by government." (Kennedy v. City of Newark (N.J. 1959) supra, 148 A.2d 473, 476.) No such "fundamental right" is expressed or implied in the Constitution, and it is not the province of the courts to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. (San Antonio School District v. Rodriguez (1973) 411 U.S. 1, 33.)

Finally, appellant points to the fact that article VII, section 6, of respondent's charter provides in part that "as to appointive officers or employees having technical, special or professional knowledge or abilities, the City Council may waive the residence requirements." The named group, argues appellant, amounts to a "classification according to occupational status," which in turn must be deemed a "suspect classification" requiring application of the strict equal protection test. Again no authority is cited. The cases holding wealth, race, and alienage to be suspect classifications are manifestly distinguishable. In the present record there is neither allegation nor proof that respondent's residence requirement is being used to unlawfully discriminate against the poor or against racial or national minorities. Authorization to make the challenged exception from the residence requirement, if and when necessary, merely reflects the reality that positions calling for specialized personnel are by definition more difficult for a

city to fill than ordinary municipal jobs. Municipal employee residence requirements often contain similar authorizations of waiver for reasons of ill health or severe financial hardship, but none has been held to create "suspect classifications" among the employees affected. The same rule should apply here.

The judgment is affirmed.

Mosk, *J.*

We concur:

Wright, *C. J.*
McComb, *J.*
Tobriner, *J.*
Burke, *J.*
Clark, *J.*